



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

BRUCE D. WHITE, CHIEF JUDGE
RANDY I. BELLOWS
ROBERT J. SMITH
BRETT A. KASSABIAN
MICHAEL F. DEVINE
JOHN M. TRAN
GRACE BURKE CARROLL
DANIEL E. ORTIZ
PENNEY S. AZCARATE
STEPHEN C. SHANNON
THOMAS P. MANN
RICHARD E. GARDINER
DAVID BERNHARD
DAVID A. OBLON
DONTAË L. BUGG

JUDGES

COUNTY OF FAIRFAX

CITY OF FAIRFAX

THOMAS A. FORTKORT
J. HOWE BROWN
F. BRUCE BACH
M. LANGHORNE KEITH
ARTHUR B. VIEREGG
KATHLEEN H. MACKAY
ROBERT W. WOOLDRIDGE, JR.
MICHAEL P. McWEENEY
GAYLORD L. FINCH, JR.
STANLEY P. KLEIN
LESLIE M. ALDEN
MARCUS D. WILLIAMS
JONATHAN C. THACHER
CHARLES J. MAXFIELD
DENNIS J. SMITH
LORRAINE NORDLUND
DAVID S. SCHELL
JAN L. BRODIE

RETIRED JUDGES

April 30, 2020

LETTER OPINION

Ms. Gretchen Schumaker
Assistant Public Defender
Office of the Public Defender
4103 Chain Bridge Road, Suite 500
Fairfax, Virginia 22030

Counsel for Petitioner

Ms. Laura Maughan
Assistant Attorney General
Office of the Attorney General
Criminal Justice & Public Safety Division
202 North 9th Street
Richmond, Virginia 23219

Counsel for Respondent

Re: *Jerome Joseph Solomon v. Stacey A. Kincaid*
Case No. CL-2020-993

Dear Counsel:

This matter came before the Court on the Petition for a Writ of Habeas Corpus of Jerome Joseph Solomon ("Petitioner") challenging his extradition to the State of New Jersey. Petitioner has previously alleged his mental incompetence is a bar. While

OPINION LETTER

conceding there is no controlling legal precedent in Virginia, Petitioner asserted he has a due process right to be examined by a mental health expert and to be restored to competence before the Court can determine the merits of his challenge to extradition. The Court was thus ultimately called upon to resolve the level of mental fitness Petitioner must possess as a matter of constitutional law in the limited context of a summary extradition proceeding, and to determine the evaluative template of application. The appellate courts of other states are divided in their treatment of such cases, with approaches ranging from denying evaluation to similarly situated detainees, to requiring restoration of mental faculties to the criminal trial standard, to a more limited "middle of the road approach." This Court finds that in an extradition proceeding where the mental competency of the detainee is placed in issue, due process compels the Court to first determine whether the detainee is sufficiently irrational to compel a mental health evaluation. If such threshold is met, the detainee is entitled to a *limited* mental health evaluation, consistent with his constitutional and statutory right to counsel, to determine whether he can assist his counsel with the narrow inquiry of whether he is the person sought by the demanding jurisdiction and was present at the time of the alleged offense. If the detainee possesses such requisite capacity to assist his counsel then the extradition process may proceed; if he lacks such cognition, he is instead entitled to be sufficiently restored to a level commensurate with the degree of assistance required.

Accordingly, in consideration of the facts presented and the observed demeanor of Petitioner, this Court holds Petitioner has exhibited sufficient irrationality to be entitled to a mental health evaluation limited to whether he can assist his counsel to determine

whether he is the person wanted by New Jersey and was present in that state at the time of the alleged offense. If Petitioner is shown to possess such limited required competence, then he may be extradited based on the unrebutted evidence already adduced that he is the person sought. If, conversely, Petitioner is found by the Court to lack the necessary fitness of mind, he may be ordered restored to the limited mental competence called for in the context of extradition proceedings, and the Court may revisit the extradition evidence anew at a future hearing.

In addition, the Court overrules Petitioner's objection to the conduct of the February 13, 2020, hearing, wherein he appeared by closed circuit audio-video link, as the statutory and constitutional safeguards delineated by precedent were amply met, if not exceeded, by the manner in which the Court conducted the proceeding.

BACKGROUND

On November 19, 2019, the Petitioner was detained in Fairfax County by the Virginia State Police on a warrant for arrest for extradition to the State of New Jersey. Petitioner was subsequently appointed counsel and declined to waive extradition in the Fairfax County General District Court. This case came before this Court on February 13, 2020, on Petition for a Writ of Habeas Corpus, wherein Petitioner sought preliminarily to adjudicate, in the limited context of an extradition proceeding, whether he is entitled to a mental health evaluation to determine his competency to assist his counsel and understand the proceedings. After an initial exchange without the presence of Petitioner, which the Court indicated would not be considered substantively in the merits phase of the extradition case, the Court made an initial determination the accused posed a security

threat to the safety of his two counsel and opted to proceed with the hearing via closed circuit audio-video link, whereby the Petitioner appeared from the Fairfax County Adult Detention Center ("ADC"). The Court then determined it would hear both the motion for a competency evaluation and the extradition hearing and take both issues under advisement. Petitioner timely objected to his remote appearance by audio-video means and to the conduct of the extradition hearing before a determination of competency was first made.

The Court reasoned proceeding via audio-video link safeguarded the competing interests of the parties without undue prejudice. With respect to Petitioner, as he posed a security risk,¹ proceeding via this mode allowed for his full participation within the confines of the Court's legal authority and its duty to keep the courtroom safe. Conducting both phases of the proceeding in one hearing also was deemed in the interest of Petitioner in not unnecessarily subjecting a potentially mentally ill person to the agitation of two evidentiary hearing sessions. The Court stated that if Petitioner was not entitled to a mental health evaluation, then the matter would have been concluded without the need of the added stress of a second proceeding. If, conversely, Petitioner was entitled to an evaluation, and if that evaluation proved he lacked the requisite mental fitness, the Court could simply revisit the extradition proceeding at a later date. The Court further noted the Commonwealth had marshalled a fingerprint expert for the proceedings. The Court ruled

¹ Petitioner is segregated from other prisoners at the ADC and has exhibited concerning behavior such as by spitting at and attempting to touch a deputy inappropriately, and flooding his cell.

it an efficient course to take all evidence in the event no further hearing was compelled by the Court's evaluation of the legal questions in contention.²

For the hearing, the Court arranged that at all times the entire courtroom was visible and audible to Petitioner. He was handed copies of exhibits simultaneously as they were shown in court. He was permitted to participate and given latitude to interject numerous times. Petitioner's two counsel were offered the opportunity to consult with their client out of the hearing of the Court at any time they chose.

The issues raised by his counsel included that Petitioner's assistance was needed to determine if he was in the demanding state, New Jersey, at the time of the extraditable offense, and to explore what other identity issues there might be.³ Petitioner's counsel

² In addition to those in New Jersey, Petitioner has criminal charges pending in Fairfax and in Staunton, Virginia, which appear to be the product of his initial arrest and later behavior at one of the state hospitals. On January 28, 2020, the Fairfax County General District Court ordered Petitioner be evaluated for competence to stand trial in the context of his pending criminal case before that court. However, the process to which he is entitled in the *criminal* context of prosecution for a crime does not dictate the process to which he is entitled in an extradition proceeding, challenged *civilly* via habeas corpus. If the Commonwealth of Virginia ("Commonwealth") were to discontinue its criminal prosecution of Petitioner, this Court would still have to make the same determination whether he is entitled to a mental health evaluation in the extradition context. If Petitioner were convicted of his pending Virginia charges and to receive a penitentiary sentence, the Commonwealth acknowledges, however, the Virginia Governor's warrant would likely be recalled as a person may not be extradited prior to completing a Virginia sentence. Upon sentencing, Petitioner could potentially thereafter be sent to New Jersey under the Interstate Agreement on Detainers. See Va. Code Ann. § 53.1-210. However, such course of action would not involve extradition and is in any event posited by the Commonwealth as unlikely in this case. While this matter was previously committed by the parties for final decision to this Court, on April 23, 2020, Petitioner's counsel notified the Court the evaluation of the Petitioner for competency to stand trial in his ancillary Fairfax criminal case has been completed and that Petitioner now desires to waive extradition. The Court will thus consider whether Petitioner possesses the requisite competence, his waiver and how to proceed, at a future hearing.

³ The Court notes, however, that the relevant evidentiary inquiry in this extradition case is circumscribed for an asylum state may not itself hold a traditional probable cause inquiry when the extradition documents on their face are in order and when those documents, although they do not set out the supporting facts, establish that there had been, in the demanding state, finding that there was 'reasonable cause' to believe that the individual as to whom extradition was sought had committed the charged offense.

Zambito v. Blair, 610 F.2d 1192, 1196 (4th Cir. 1979) (citing *Michigan v. Doran*, 439 U.S. 282 (1978)).

represented their client was neither rational nor able to participate meaningfully in the proceedings, and that this would be observable when the Court began its hearing via video.

The Commonwealth, while asserting reliance on a presumption of correctness of the extradition papers and maintaining Petitioner had the burden of persuasion by a preponderance of the evidence that the extradition documents did not establish he was the person sought by New Jersey, opted to present evidence to counter any argument to the contrary from Petitioner. The Commonwealth further posited that the introduced evidence far exceeded that which this Court required for extradition in the case of *Abarca Soriano v. Commonwealth*, 98 Va. Cir. 243 (Fairfax 2018), which delineated extensively the procedural and substantive requirements for extradition from Virginia in application of the Full Faith and Credit Clause of the U.S. Constitution.

The Commonwealth established prima facie through unrebutted fingerprint and other evidence that Petitioner is the person sought by New Jersey. Booking photographs from New Jersey appeared to depict Petitioner. In addition to the testimony from a fingerprint expert, the Commonwealth relied on the extradition papers which contained an affidavit from a paralegal in New Jersey, stating she has familiarity with the case against Petitioner, that she can identify him, and that he is the person wanted. Petitioner's descriptors on the fingerprint card from New Jersey were consistent with his identity, including his height, weight, race, eye color, and hair color.

Petitioner did not testify under oath but exhibited reactive awareness to some of the issues at play. He made outbursts claiming he has a twin brother and noting he

currently has a tattoo between his eyebrows and black hair instead of gray hair on his chin, in contrast to the booking photographs from New Jersey. He exhibited some awareness that the proceedings pertained to evaluating his mental health. When told they also implicated whether he would be sent back to New Jersey, he admitted being from there and asked whether he could go back.

After hearing the evidence and argument of counsel, the Court took this matter under advisement, availing the parties of the opportunity of further briefing to better enable the Court to address resolution of the dispute by means of this letter opinion, which this Court now does in turn.

ANALYSIS

I. A Detained Person Has a Limited Right to Competency in Extradition Proceedings

The threshold question before the Court is whether a detained person has a due process right to competency in extradition proceedings and, if so, what level of mental acuity is required. While there is no controlling Virginia precedent on this issue, a number of other state courts have considered the problem, interpreting the Uniform Criminal Extradition Act, which Virginia has adopted. Va. Code Ann. tit. 19.2, Ch. 8, Art. 2. States take three different approaches to the question of competency in extradition proceedings: (1) finding no right to competency; (2) finding the same right to competency as in a criminal trial; and (3) the so-called "middle of the road approach," which tailors the competency right to the extradition process.⁴

⁴ The Commonwealth advocates in their brief this Court adopt the "middle of the road approach." Defense counsel advocates for the broader approach of applying the same competency standard as in a criminal

A. The No Right to a Competency Hearing Approach

One state's appellate court, the Court of Appeals of Kentucky, has found no right to competency, in a short opinion holding summarily, "[a]fter a careful review of the records and the briefs, this court is of the opinion that the question of the mental competence of a fugitive in extradition proceedings is not relevant." *Kellems v. Buchignani*, 518 S.W.2d 788 (Ky. 1974) (citing *Charlton v. Kelly*, 229 U.S. 447 (1913) (holding that an insanity plea and evidence supporting it was not proper for consideration during extradition proceedings); *State ex rel. Davey v. Owen*, 133 Ohio St. 96 (1937) (holding that the appropriate forum to judge present insanity is the demanding state)). This approach is unsatisfying from a due process perspective, because taken to the extreme, if the accused's ability to participate meaningfully in the proceedings is "irrelevant," then his right to participate at all is in question so long as he has counsel. This holding raises more questions than it answers where a liberty interest is at stake. Could an accused be extradited without being conscious or even present at the merits hearing? The logic underlying a lack of consideration of mental capacity to participate in an extradition hearing is inconsistent with the minimal norms of process that should be due in the way courts treat those afflicted with mental illness.

trial, while, in the alternative, arguing that the "middle of the road approach" reflects the "minimum level of competency" required to give meaning to the statutory right to counsel.

B. The Criminal Trial Standard of Competency Approach

At least five states have found the criminal trial standard for competency applies.⁵ That is, in extradition proceedings, the “test must be whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 403 (1960). The Massachusetts Supreme Court explained this reasoning in *In re Hinnant*, writing, “Nevertheless, where a potential deprivation of liberty is involved, it is appropriate that we consider due process rights as we would were this a criminal proceeding.” *In re Hinnant*, 424 Mass. 900, 907-08 (1997).

The extension of principles of full restoration of mental capacity that might be requisite for a criminal trial to extradition hearings is also troubling, for extradition proceedings are summary in nature and generally address only the limited question of whether the demanding state has sufficiently and adequately identified the person sought. “It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand *trial*.” *Medina v. California*, 505 U.S. 437, 439 (1992) (emphasis added). Extradition is, however, not the *trial* of the underlying charges. The accused need not possess an understanding of the charges nor be able at the extradition stage to assist in defense of the merits of such charges pending in the demanding state. Even persons suffering from severe mental

⁵ See *Kostic v. Smedley*, 522 P.2d 535 (Alaska 1974); *State ex rel. Jones v. Warmuth*, 165 W. Va 825 (1980); *Pruett v. Barry*, 696 P.2d 789 (Colo. 1985); *People v. Kent*, 507 N.Y.S.2d 353 (1986); *In re Hinnant*, 424 Mass. 900 (1997).

illness may still possess sufficient capacity to assist their counsel in resolving the simple determination at hand in an extradition case: his identity and previous presence in the demanding state, and in this case specifically, whether Petitioner is the person sought by New Jersey.

C. The Middle of the Road Approach

The “middle of the road approach” has been adopted by at least six states.⁶ These states have found that

in order to give effect to a petitioner’s right to counsel and his right to test the legality of his arrest in the extradition context, he must be sufficiently competent to consult with his counsel. Given that an alleged fugitive is entitled to counsel and entitled to challenge the legality of his arrest and assert defenses on the basis of which the extradition warrant may be dismissed, the accused must be sufficiently competent to discuss with his counsel facts relating to the limited defenses that may be raised.

Ex parte Potter, 21 S.W.3d 290, 296-98 (Tex. Crim. App. 2000). This Court finds the reasoning in such approach compelling and most consistent with the more limited norms of due process applicable in enforcement of the Extradition Clause of the U.S. Constitution, which states in relevant part,

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

U.S. Const. art. IV, § 2, cl. 2. On the one hand, the “middle of the road approach” balances making the right to counsel meaningful rather than perfunctory, assuring the accused’s assistance to his counsel. On the other hand, this approach does not extend the process

⁶ See *State v. Tyler*, 398 So.2d 1108 (La. 1981); *Oliver v. Barrett*, 269 Ga. 512 (1998); *In re Potter*, 21 S.W.3d 290 (Tex. 2000); *State ex rel. Reed v. Frawley*, 59 S.W. 3d 496 (Mo. 2001); *State v. Patton*, 287 Kan. 200 (2008); *In re Pers. Restraint of Jian Liu*, 150 Wash. App. 484 (2009).

due in a criminal trial to what is constitutionally the lessened requirement for a summary proceeding. In evaluating the soundness and applicability of this approach to the case at bar, the Court must consider the nature of due process protections and the nature of extradition proceedings to determine the legal recourse that must be afforded Petitioner.

1. Due Process Is Flexible in Its Scope and Should Be Tailored to Fit the Proceeding at Hand

The U.S. Supreme Court has held that “consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.” *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). Due process is flexible and should be tailored to fit the nature of the liberty interest at stake. The U.S. Supreme Court has set forward guidelines for this tailoring:

“[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a ‘right’ or as a ‘privilege.’” Whether any procedural protections are due depends on the extent to which an individual will be “condemned to suffer grievous loss.” The question is not merely the “weight” of the individual's interest, but whether the nature of the interest is one within the contemplation of the “liberty or property” language of the Fourteenth Amendment. Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. “(C)onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.” To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (internal citations omitted).

An illustrative example of this type of tailoring can be found in *Harvey v. Commonwealth*, wherein the Supreme Court of Virginia considered the question of whether the Due Process Clause required the government to provide an expert in the limited context of a violation of conditional release by a person previously committed under the Sexually Violent Predators Act (“SVP”). *Harvey v. Commonwealth*, 297 Va. 403 (2019); Va. Code Ann. § 37.2-900 *et seq.*⁷ While *Harvey* is not exactly on point, the scope of the inquiry is not dissimilar from the one before this Court. SVP proceedings, like extradition challenges by means of habeas corpus, are civil proceedings wherein the liberty interest of an individual is at stake and there is a statutory right to counsel. See Va. Code Ann. § 19.2-95. Therefore, the Court’s reasoning is instructive both for considering the approach to due process and the interests weighed in such a circumstance.

In *Harvey*, the court held that the Due Process Clause does not require the state to appoint a psychological expert to assist an indigent person in a conditional release violation hearing. *Harvey*, 297 Va. at 408. The Court relied on the three-factor test of *Mathews v. Eldridge*, to determine the scope of due process protections:

- (1) the private interest that will be affected by the official action;
- (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and
- (3) the

⁷ For the proceeding wherein it is first determined whether the respondent is a Sexually Violent Predator, such respondent has a statutory right to the assistance of a mental health expert at the expense of the state provided the respondent cooperates with a mental health evaluation. Va. Code Ann. § 37.2-907. Thus, the holding of the Supreme Court of Virginia in *Harvey* is limited to the circumstance wherein appointment of an expert is sought when the respondent is facing revocation of the conditional release plan and detention anew based on alleged violation of such plan.

Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.

Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

The issue in *Harvey*, like the issue of competency in extradition presented here, had a criminal analogue in *Ake v. Oklahoma*, 470 U.S. 68, 77-80 (1985), where the U.S. Supreme Court held that in a criminal proceeding, specifically a capital murder case, the indigent defendant had a constitutional right to an appointed psychiatric expert to testify at trial. However, the *Harvey* court held, “[t]he fact that a respondent in a proceeding under Code § 37.2-913 is provided ‘some of the safeguards applicable in criminal trials cannot itself turn these proceedings into criminal prosecutions requiring the full panoply of rights applicable there.’” *Harvey*, 297 Va. at 418 (quoting *Allen v. Illinois*, 478 U.S. 364, 372 (1986)). The court found that while a liberty interest is at stake in an SVP revocation of conditional release hearing, the interest is notably lesser than at a criminal trial, namely that “[t]he potential deprivation of liberty in a hearing under Code § 37.2-913 is not a fixed term of incarceration or death, but a revocation of conditional release and short-term civil commitment. Even when a sexually violent predator is committed, the commitment only lasts until the next hearing or annual review.” *Id.* at 419.

The second part of the *Mathews* framework, the state's interest, *Harvey* held weighed against appointing an expert because SVP hearings demand expediency and economy and an expert appointment would unnecessarily fiscally and administratively burden the government. Unlike criminal trials, SVP revocation hearings are “more akin to bail hearings or to a civil emergency custody order under Code § 37.2-808, under which a magistrate acts on an expedited basis to determine whether a person should be placed

into temporary custody That initial decision will then be revisited at a future date.” *Id* at 422. As to the third factor, risk of erroneous deprivation, the Court held that the entitlement to other rights such as the right to counsel, the right to receive notice, testify, present evidence, and cross examine witnesses, as well as subsequent review, “significantly mitigated” the risk of erroneous deprivation. *Id.* at 422-23.

In *Harvey*, the Supreme Court of Virginia applied precedent regarding the flexible and tailored nature of due process, demonstrating how to determine the “procedural protections [that] the particular situation demands.” *Harvey*, 297 Va. at 417 (quoting *Morrissey*, 408 U.S. at 481). Therefore, this Court must next consider the particular situation of an extradition proceeding and determine what procedural protections are required in this case.

2. Due Process Requires a Modicum of Competency in Extradition Proceedings

When the Governor of Virginia receives an extradition request and issues a Warrant of Rendition, the Uniform Criminal Extradition Act and the Virginia Code provide a right to counsel and to a habeas corpus proceeding in which the legality of the extradition may be tested. Va. Code Ann. § 19.2-95. To wit:

No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a circuit or general district court in the Commonwealth, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus.

Id. The right to counsel is inextricably linked to a competency inquiry and where a right to counsel exists, such right must also be meaningful and effective. See *Dusky*, 326 U.S. at 402-03; *Lovitt v. Warden*, 266 Va. 216 (2003). Therefore, in order to satisfy the right to counsel and the right to test the legality of the extradition guaranteed by Code § 19.2-95, the Petitioner must have an ability to assist counsel in preparing and presenting his defense to the extradition request. *Dusky*, 326 U.S. at 402-03. The question, then, is, what is the scope of that ability as required by due process? To answer, a court must “determin[e] the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.” *Cafeteria & Restaurant Workers Union*, 367 U.S. at 895.

First, the Court must examine the nature of the government function, the second prong of the government interest under the *Mathews* test. In extradition proceedings, the government interest is an efficient process for moving arrestees from one state to another. The U.S. Supreme Court has explained this interest as follows:

Interstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, § 2, cl. 2, of the Constitution. The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial.

Doran, 439 U.S. at 287 (internal citations omitted).

Habeas proceedings are intended to efficiently assess whether the extradition process has been lawfully executed. The question presented is whether the person the demanding state is seeking is the person who has been arrested on the Warrant of Rendition, and further, whether all legal obligations of the Warrant have been carried out.

The examining court does not interrogate the merits of the charge or any other elements of the demanding state's case. The U.S. Supreme Court has circumscribed the extradition habeas inquiry to four questions:

(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable.

Id. at 289.

Second, the court must evaluate the nature of the private interest, or the liberty interest, at stake. In extradition, as in the SVP proceeding discussed in *Harvey*, the liberty interest at stake is not the "grievous loss" of total liberty for a term or life of a criminal trial. See *Morrissey*, 408 U.S. at 481. Rather, the liberty at stake in extradition is a temporary detention in the extraditing state and involuntary transfer to the demanding state. If there is an error, in that the person the demanding state is seeking is not the person who committed the crime charged, that temporary detention can be reversed by the due process protections of the criminal process in the demanding state.

Likewise, with regard to the "risk of an erroneous deprivation of such interest," addressed by *Mathews*, the fact that extradition is a temporary process merely designed to facilitate the transfer of a wanted person prior to trial includes, by design, procedural safeguards. Once extradited, a person still must be given full due process protections throughout the criminal process by the demanding state. Like in *Harvey*, "[t]hat initial decision will then be revisited at a future date," 297 Va. at 422, when the extradited person will face the demanding state's court. Additionally, the four factors considered in an

extradition proceeding are designed to prevent error. The court must review filed extradition documents and procedural history and is charged to evaluate “whether the petitioner is the person named in the request for extradition,” which must be proven satisfactorily. When, as in this case, un rebutted evidence such as fingerprints is used to demonstrate that the right person sought is being extradited, the risk for erroneous deprivation is low.

Therefore, while a petitioner is entitled to counsel and to be competent to assist that counsel, those rights must be tailored to the “summary and mandatory” nature of an extradition proceeding. *Doran*, 439 U.S. at 288. That is, his competence to assist counsel is limited to what counsel may raise in *the extradition* proceeding rather than in defense to the crime charged, namely, the four limited defenses enumerated in *Doran*. Further, Petitioner’s ability to be of assistance to his counsel is relevant to only two factors:

A petitioner could conceivably have knowledge of facts relating to two of these issues: (1) whether the petitioner is the person named in the request for extradition (identity); and (2) whether the petitioner was in the demanding state at the time of the alleged offense (presence). *Oliver*, 500 S.E.2d at 910; *Warmuth*, 272 S.E.2d at 451. Where the fugitive’s incompetence prevents him from being able to consult with his counsel in connection with the issues of his identity and presence, those defenses may be foreclosed.

Potter, 21 S.W.3d at 296-98.

The approach of the Kentucky court to this question, holding that no competency is required, disregards the fact that in order for representation to be meaningful, counsel needs to be able to consult with the client and maintain a sufficiently rational discussion about available defenses. The broadest approach favored by five other states, on the flip side, disregards the summary nature of an extradition proceeding and the necessity of

evaluating due process protections based on the proceedings and interests at stake. The so-called “middle of the road approach,” then, is the correct one. A petitioner must be able to consult rationally with his counsel as to his identity and presence in the demanding state at the time of the alleged offense in order to meet the competency standard due process requires.

D. As the Facts Adduced Suggest Irrationality, Petitioner Here is Entitled to a Limited Mental Health Evaluation

The Court now turns to the facts of the case at bar in application of the aforesaid principles and standards, and of the “middle of the road approach.”

When an issue of competence is raised, an evaluating court must assess the observable rationality of the petitioner and evidence of his mental state. The U.S. Supreme Court has guided that

evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Drope v. Missouri, 420 U.S. 162, 180 (1975).

This Court finds the following facts suggest Petitioner was irrational: Petitioner consistently identified himself by different nonsensical names, claimed to be related to persons with whom he has no connection, enunciated disjointed and irrational thoughts lacking any reasoned organization, had an unduly agitated demeanor with his mind racing from one thought disconnected from reality to another, failed to respond to reasoned

directives from the Court, appeared generally unaware of the type of proceeding that was being conducted, and engaged in consistently bizarre behavior while incarcerated, including flooding his cell and attempting to assault jail staff. On the other hand, during the February 13, 2020, hearing, Petitioner also interjected cogent remarks regarding his identity and previous presence in New Jersey. Though blanketed in a sea of comments dissociated from reality, Petitioner exhibited reactive awareness to some of the pertinent issues being considered. Specifically, as the issue of his identity was discussed, he made outbursts claiming he has a twin brother, noted he currently has a tattoo between his eyebrows and black hair instead of some gray hair on his chin, which is different from the New Jersey booking photographs, which the Commonwealth introduced. He further exhibited some awareness that the proceedings pertained to evaluation of his mental health. When informed the hearing also implicated whether he should be sent back to New Jersey, he stated he was from there and inquired whether he could go back.

These issues of identity and presence in the demanding state at the time of the offense charged are fundamentally the only factually determinative matters in an extradition hearing in which the petitioner's ability to assist his counsel are arguably implicated. The threshold inquiry here as to whether Petitioner possesses sufficient cognition or conversely is irrational enough to merit a competency evaluation was thus the object of significant conflicting evidence. The Court must additionally weigh into the balance the representations of Petitioner's counsel who stated that they had been unable to cogently communicate with their client respecting his identity and involvement in the crimes alleged by New Jersey. While but one consideration, "an expressed doubt" by

defense counsel about their client's competency "is unquestionably a factor which should be considered." *Dang v. Commonwealth*, 287 Va. 132, 151 (2014) (citing *Drope*, 420 U.S. at 177 n.13).

After a careful weighing of the above-referenced facts, and in particular reliance on the observed demeanor of Petitioner, coupled with the representations of his counsel, the Court does find that although it is a close call, Petitioner displayed consistent indicia of irrational thought and behavior sufficient to compel this Court direct a *limited* competency evaluation.

This evaluation is restricted to the two factors about which Petitioner may assist counsel in defending the extradition proceeding: whether he is the person sought by New Jersey and whether he was present in that state at the time of the alleged offense. If the evaluation persuades the Court that Petitioner cannot be of sufficient assistance to his counsel to address the limited circumstances of identity and presence, he shall be entitled to restoration to the extent he can be of assistance to his counsel in regard to these two factors.

While it is clear in this particular case that New Jersey has gone well above what is necessary to identify Petitioner, including via fingerprints, such evidence does not render the threshold legal test of competency moot. Otherwise, competence at trial would not be required in the case where the state relies on unrebutted scientific evidence. In other words, proof and due process are two different (although related) concepts. Further, this would require the Court to speculate as to what assistance Petitioner could provide to rebut such a narrow category of evidence. Even the collection of scientific evidence is

potentially subject to factual dispute and, therefore, Petitioner must be able to consult with his counsel regarding such factual matters.

Although in oral argument the Commonwealth suggested that under the facts of this case Petitioner is not entitled to further evaluation, on brief, the Commonwealth urged the Court to adopt the “middle of the road approach” in arriving at such conclusion as it

most appropriately balances an accused’s right to challenge an extradition with the Supreme Court’s instructions that extraditions are to be summary and mandatory proceedings. Additionally, this “middle of the road” approach appropriately considers the flexible nature of due process and satisfies the requirements of due process in the context of these proceedings.

Resp’t’s Br. 10. Petitioner urges use of the broader criminal trial standard approach which this Court rejects for the reasons already stated, but as a fallback relies on the “middle of the road approach” as the “minimum standard of competency.” Pet’r’s Br. 4. The Court is persuaded for the reasons delineated herein that the “middle of the road approach,” applied in the manner the Court has demarcated, fulfills the constitutional right to due process in extradition proceedings applicable in Virginia, affording the Petitioner, having met an initial threshold test of irrationality, a right to a *limited* evaluation to determine whether he is sufficiently competent to consult meaningfully with his counsel with regard to his identity and presence in New Jersey at the time of the alleged offense.

II. The Conduct of the Hearing Through the Real-time Audio-Video Appearance of Petitioner Was Proper

During the hearing, the undersigned judge ordered that Petitioner appear remotely from a room set up for video conferencing in the ADC. Petitioner’s counsel requested their client be brought to the courtroom from the holding room. However, the Court

determined that Petitioner's previously demonstrated behavioral issues constituted a hazard to his own counsel, as well as to others in the courtroom.

Petitioner's appearance by video is authorized under Virginia Code § 17.1-513.2, which provides that

in any civil proceeding in which a party or a witness is incarcerated or when otherwise authorized by the court, the court may, in its discretion, conduct any hearing using a telephonic communication system or an electronic audio and video communication system to provide for the appearance of any parties and witnesses. Any electronic audio and video communication system used to conduct such a hearing shall meet the standards set forth in subsection B of § 19.2-3.1.

Va. Code Ann. § 17.1-513.2. The referenced requirements of subsection B of § 19.2-3.1. are that the persons communicating must simultaneously see and speak to one another; the signal transmission must be live, in real-time; the signal transmission must be secure from interception through lawful means by anyone other than the persons communicating; and the manner of communication is subject to any other specifications as may be promulgated by the Chief Justice of the Supreme Court of Virginia. *Id.* The closed-circuit video technology used by this Court for internal conferencing between the courtroom and the ADC satisfied all of these standards.

While this case falls under a civil statute wherein video testimony is authorized at the Court's discretion, the Court is still inclined, due to the liberty interest at stake in an extradition hearing, to consider the constitutional requirements on such hearing when accomplished by video. While case law on the constitutional impact of video technology is limited, the cases that have been decided focus on general principles of confrontation and other rights, applying general standards to video appearances.

In *Maryland v. Craig*, the U.S. Supreme Court permitted the use of one-way video technology in child abuse cases where the defendant could see and hear the testifying child, but the child could not see the defendant. *Maryland v. Craig*, 497 U.S. 836 (1990). The Court noted that while the Confrontation Clause “reflects a preference for face-to-face confrontation at trial,” that preference must “occasionally give way to considerations of public policy and the necessities of the case.” *Id.* at 849.

Likewise, in *United States v. Abu Ali*, the Fourth Circuit upheld the use of video conferencing when, in a terrorism case, members of the Mabahith (the Saudi secret police) were not permitted by the Saudi government to testify outside of Saudi Arabia. *United States v. Abu Ali*, 528 F.3d 210, 241 (4th Cir. 2008). In making this determination, the court relied on the test used in *Craig*. First, the court must show that denial of face-to-face confrontation is necessary to “further an important public policy.” *Id.* at 240. Second, the court must make certain that “absent face to face confrontation, the reliability of the testimony is otherwise assured.” *Id.* at 241. Citing *Craig*, the court found that so long as “the presence of other elements of confrontation—oath, cross-examination, and observation of the witness’ demeanor—adequately ensure that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to the accorded live, in-person testimony,” video conferencing may be employed. *Id.*

In the instant case, the Court took all measures to ensure that Petitioner’s constitutional rights were protected to the same extent as they would be in a hearing where he was present in person. Petitioner’s counsel were in the courtroom to represent his interests zealously and could observe the Court and witnesses’ demeanor

unhindered. The Court positioned the courtroom cameras to show Petitioner the entirety of the courtroom over the video conferencing link and preserved a printed photograph of his view in the record of trial. Copies of exhibits shown the Court were displayed in paper form to Petitioner by deputies in the ADC assisting during the trial so that he could see each exhibit as it was being discussed and reviewed in the courtroom. Petitioner was given full opportunity to participate, with both two-way audio and video in use throughout the proceeding.

The Court's decision to have Petitioner appear via video satisfied the first prong of the *Craig* test in that the important public policy of protecting the safety of counsel and others in the courtroom, as well as Petitioner himself, justified having him appear remotely. The second prong, that reliability of testimony and protection of rights is otherwise assured, was met by the presence of counsel, the accurate and real-time audio and video transmission, and the access to exhibits in the courtroom. The video appearance of Petitioner was properly ordered and equaled or exceeded applicable constitutional and statutory requirements due.

CONCLUSION

The Court has considered the Petition for a Writ of Habeas Corpus of Jerome Joseph Solomon challenging his extradition to the State of New Jersey. Petitioner has previously alleged his mental incompetence is a bar. While conceding there is no controlling legal precedent in Virginia, Petitioner asserted he has a due process right to be examined by a mental health expert and to be restored to competence before the Court can determine the merits of his challenge to extradition. The Court was thus

ultimately called upon to resolve the level of mental fitness Petitioner must possess as a matter of constitutional law in the limited context of a summary extradition proceeding, and to determine the evaluative template of application. The appellate courts of other states are divided in their treatment of such cases, with approaches ranging from denying evaluation to similarly situated detainees, to requiring restoration of mental faculties to the criminal trial standard, to a more limited "middle of the road approach." This Court finds that in an extradition proceeding where the mental competency of the detainee is placed in issue, due process compels the Court to first determine whether the detainee is sufficiently irrational to compel a mental health evaluation. If such threshold is met, the detainee is entitled to a *limited* mental health evaluation, consistent with his constitutional and statutory right to counsel, to determine whether he can assist his counsel with the narrow inquiry of whether he is the person sought by the demanding jurisdiction and was present at the time of the alleged offense. If the detainee possesses such requisite capacity to assist his counsel then the extradition process may proceed; if he lacks such cognition, he is instead entitled to be sufficiently restored to a level commensurate with the degree of assistance required.

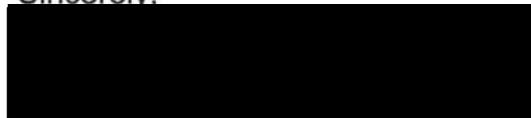
Accordingly, in consideration of the facts presented and the observed demeanor of Petitioner, this Court holds Petitioner has exhibited sufficient irrationality to be entitled to a mental health evaluation limited to whether he can assist his counsel to determine whether he is the person wanted by New Jersey and was present in that state at the time of the alleged offense. If Petitioner is shown to possess such limited required competence, then he may be extradited based on the unrebutted evidence already

adduced that he is the person sought. If, conversely, Petitioner is found by the Court to lack the necessary fitness of mind, he may be ordered restored to the limited mental competence called for in the context of extradition proceedings, and the Court may revisit the extradition evidence anew at a future hearing.

In addition, the Court overrules Petitioner's objection to the conduct of the February 13, 2020, hearing, wherein he appeared by closed circuit audio-video link, as the statutory and constitutional safeguards delineated by precedent were amply met, if not exceeded, by the manner in which the Court conducted the proceeding.

Consequently, and further, the Court having been recently informed that the mental health evaluation of Petitioner to stand trial has been coincidentally completed in his ancillary criminal case pending in the Fairfax County General District Court, and that he now desires to waive extradition, the Court shall by separate order set a hearing at which it may determine the competence of Petitioner consistent with the guideposts in this opinion, and entertain his waiver of extradition,⁸ and until such time, THIS CAUSE CONTINUES.

Sincerely,

A large black rectangular redaction box covering the signature of David Bernhard.

David Bernhard
Judge, Fairfax Circuit Court

⁸ Virginia Code § 19.2-114 prescribes the procedure for this Court to entertain a written waiver of extradition which includes "the duty of the judge to inform [Petitioner] of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in § 19.2-95." The Petitioner must further execute his "consent" to waive extradition. It is axiomatic that such consent must be knowingly and voluntarily tendered with the requisite mental capacity to do so, particularly when the Petitioner has previously asserted a lack of mental competency and exhibited substantial irrationality.